IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.1113 of 1993

1. Karuppanna Udayar
2. Leelavathy

... Appellants/Plaintiff

Vs.

1. Muthusamy
2. Pappal
3. Sethu Ammal
4. Anjalai Ammal
5. Aruvatham Ammal
6. Arayammal
7. Palanisamy
8. Ammasi

Respondents 1,7 & 8 remained exparte before the Lower Court. Hence Notice to Respondents 1,7 & 8 not necessary.

... Respondents/Defendants

PRAYER: First Appeal against the Judgment and decree of the Principal Subordinate Judge, Salem dated 29.04.1993 passed in O.S.No.245 of 1988.

For Appellants : Mr.P.Jagadeesan
For Respondents : Mr.R.Subramaniam for Mr.V.Krishnan for R6
R2 to R5 No appearance
R1, R7 and R8 NDW

J U D G M E N T

The unsuccessful plaintiffs in the court below are the appellants. The plaintiffs are the husband and wife. Plaintiffs filed the suit for partition and separate possession claiming 7/18th share in the suit property, which is the agricultural punja lands to the extent of 3.31 acres situated in Ammani Kothanoor Village, Salem Taluk.

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2. The case of the plaintiffs is that the first plaintiff and the first defendant are brothers and they are the members of the joint family. According to the plaintiffs, the father of the first plaintiff and the first defendant, Theerappa Udayar purchased the suit property on 04.12.1945 from one Kulanthapillai, marked as Ex.A.1 . He settled one third undivided share in the suit property in favour of the plaintiffs on 03.04.1961 marked as Ex.A.4, which is a registered settlement deed. Another one-third undivided share was sold by Theerappa Udayar to one Vedaathal on 10.10.1957 marked as Ex.A.2, which according to the parties contain a clause for reconveyance. The said Ex.A.2 was executed by Theerappa Udayar along with the first defendant. The first defendant has repurchased the same from Vedathaal under a sale deed dated 01.10.1964 marked as Ex.A.3, the original of which was marked on the side of the defendant as Ex.B.1. The first defendant who has purchased the share under the said Ex.A.3 is stated to have sold the same to the 6th defendant, under a sale deed dated 31.08.1987 marked as Ex.A.5. In respect of the remaining one third undivided share, the father of the first plaintiff and first defendant Theerappa Udayar continued to be in possession till his death which was four years before the filing of the suit, the suit having been filed on 15.03.1988. The said Theerappa Udayar's wife predeceased him and defendants 2 to 5 are the daughters of Theerappa Udayar.

3. According to the plaintiffs, the said Theerappa Udayar died leaving behind him the first plaintiff, first defendant and defendants 2 to 5 as his legal heirs and they are entitled for equal share in respect of the remaining one third share of the property which belonged to Theerappa Udayar. In addition to that as per the settlement deed executed by Theerappa Udayar in favour of the plaintiffs on 03.04.1961 under Ex.A.4 they are entitled for another one third undivided share and therefore, the plaintiffs are entitled totally for 7/18th share in the suit properties. According to the plaintiffs, the first defendant has not only sold an undivided one third share which was repurchased by him from Vedathaal to the 6th defendant on 31.08.1987 under Ex.A.5 but he has also sold another share to the 6th defendant for himself and on behalf of defendants 2 to 5 on 07.09.1987 under Ex.A.6, the original of which was filed on the defendant’s side as Ex.B.3. Since there was no division among the coowners at any point of time, according to the plaintiffs, the vendors have no right to convey any portion with the specific boundaries. The plaintiffs have filed earlier a suit for declaration in O.S.No.629 of 1987 against defendants 1 to 3 which was subsequently withdrawn on 04.12.1987, with liberty to file a fresh suit. The request of the plaintiffs to divide the properties have not been headed to and therefore, they have filed the present suit for partition. The first defendant remained exparte.

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4. The defendants 2 to 5 have filed a memo before the Trial Court giving no objection for a decree passed as prayed for by the plaintiffs. The defendants 2 to 5 have also paid Court fee claiming 2/18th share in the suit property. However, it remains the fact that in the suit they remained exparte. The 6th defendant, who is the subsequent purchaser from the first defendant has filed written statement. While the relationship between the plaintiffs and defendants 1 to 5 are admitted and also while admitting that Theerappa Udayar has settled one third share of the property in favour of the plaintiffs on 03.04.1961 under Ex.A.4 and also admitting that another one third share measuring 1.10 acres was sold by Theerappa Udayar in favour of Vedathaal, which was subsequently purchased by the first defendant and the same was sold to the 6th defendant on 07.09.1987, it is the specific case of the 6th defendant that the said document under which the 6th defendant has purchased the property contained a specific division with boundaries. It is also the case of the 6th defendant that even one third share given by Theerappa Udayar to the plaintiffs on 03.04.1961 was with boundaries and it was based on the said Ex.A.3 and A.5 sale deeds dated 01.10.1964 and 31.01.1987, the 6th defendant has taken the specific portion of 1.10 acres. It is the case of the 6th defendant that it is only in respect of the remaining 1.10 acres which was specified and was in possession of Theerappa Udayar on his death, the same was succeeded equally by the first plaintiff, the first defendant and defendants 2 to 5.

5. According to the 6th defendant he has not only purchased the one third specified share from the first defendant which was originally sold by Theerappa Udayar to Vedathaal and reconveyed in favour of the first defendant under Ex.A.3, he has also purchased the share of the first defendant and the shares of four daughters, namely, defendants 2 to 5 out of the remaining one third share of 1.10 acres left by Theerappa Udayar under a sale deed dated 07.09.1987 marked as Ex.A.6 original of which was marked as Ex.B.3 on the defendant's side. Therefore, according to the 6th defendant the said defendant has purchased the specified portion, while the plaintiffs have been given properties under the settlement deed and put in possession and therefore, the plaintiffs are not entitled to any partition with respect to 1.10 acres of land. According to the 6th defendant there has been a partition earlier and daughters of Theerappa Udayar and the first defendant have already sold, their properties in favour of the 6th defendant, who is in possession. It is also the case of the 6th defendant that the suit is barred by rejudicata, in view of the decision in earlier suit filed by the plaintiffs in O.S.No.629 of 1987. On the basis of the above said pleadings the parties went to trial. The first plaintiff was examined as P.W.1 and on the side of the plaintiffs documents Exs.A.1 to A.10 were marked. On the side of the defendant's since defendants 1,7 and 8 have remained exparte and defendants 2 to 5 having filed a memo as stated above, have not chosen to appear and therefore they were set exparte only the 6th defendant has appeared and he was examined as D.W.1 apart from another witness on his side as D.W.2 and documents B.1 to B.10 were marked on the side of the 6th defendant.

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6. The Trial Court has framed the issues, namely,

1) Whether the plaintiffs are entitled for decree for partition,

2) Whether the decision in O.S.No.629 of 1987 on the file of the District Munsiff Court, Salem would act as rejudicata for the present suit

3) Whether 7 and 8th defendants are necessary parties

4) Whether court fee has been properly paid and

5) To what relief the plaintiffs are entitled

7. The Trial Court having analyzed the pleadings, evidence and various documents relied upon by the parties has concluded that there was already a partition among the parties and separate possession and therefore, there was no question of fresh partition, apart from finding that the properties sold to the 6th defendant and settlements made to the plaintiffs by Theerappa Udayar were with specific boundaries and also finding that the suit has been filed by the plaintiffs in collusion with the first plaintiff's sisters, namely, defendants 2 to 5 and in view of the same, the suit for partition was dismissed. It is as against the said judgement of the Trial Court, the present appeal is filed by the plaintiffs.

8. Mr.Jagadeesan, learned counsel appearing for the plaintiffs would submit that there was no division between coowners at any point of time even during the time when Theerappa Udayar was living. He would submit that the very fact that the Theerappa Udayar and the first defendant have sold the undivided one third share to Vedathaal on 10.10.1957 under Ex.A.2 without specific extent would show that there was no partition. According to him, the said Ex.A.2 was executed not only by Theerappa Udayar but also by the first defendant being one of his son, even though it is admitted that under reconveyance dated 01.10.1964 by which the first defendant has purchased the properties from Vedathaal along with the first defendant's father Theerappa Udayar contains specific recitals regarding 1.10 acres. He would also submit that under the sale deed given in favour of the 6th defendant dated 07.09.1987 which was entered by the first defendant along with his sisters, namely, defendants 2 to 5 as their power agents marked as Ex.A.6 and the sale deed in respect of one third share by the first defendant to the 6th defendant dated 31.08.1987 marked as Ex.B.2, they contain false recitals as if there was a division. Therefore, according to the learned counsel the title of the 6th defendant will be only an undivided share. In respect of the plea of res judicata it is the contention of the learned counsel for the appellant that since in the earlier suit in O.S.No.629 of 1987, liberty was given to file a fresh suit and the said suit was withdrawn without adjudication on 04.12.1987 there was no decision on merit and therefore, the question of res judicata does not arise.

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9. On the other hand, Mr.R.Subramanian, learned counsel appearing for the 6th respondent would submit that the factum of partition in the family is specifically stated in the sale deed executed by Theerappa Udayar along with the first defendant to Vedathaal on 10.10.1957 under Ex.A.2. That apart it is his contention that the first plaintiff himself has admitted that the specific property has been sold to the 6th defendant. It is also his contention that the various documents marked as Ex.A.5, B.2 and B.3 contain specific boundaries and the same has been considered by the Trial Court and according to the learned counsel since the 6th defendant is a purchaser, he can only be expected to prima facie be satisfied that there was a partition in the family and he cannot be expected to prove the partition in the strict sense especially when in the present case, the partition had been oral. He would also submit that the suit itself is filed in collusion by the plaintiffs, defendants 2 to 5 who remained exparte, but at the same time filed a memo stating as if they are entitled for 2/18th share, especially through their brother, the first defendant have executed sale deed in respect of their portion in favour of the 6th defendant under Ex.B.3.

10. After hearing the submission made by the learned counsel for the appellants as also the respondents and going through the pleadings, evidence and judgement the following points arises for consideration in this first appeal,

Whether the plaintiffs are entitled for partition and allotment of 7/18th share has claimed by them?

Whether the suit is hit by res judicata? and

Whether the judgement of the Trial Court is liable to be set aside?

11. On the point of the plea of res judicata, it is admitted that the first plaintiff has filed the previous suit in O.S.No.629 of 1987 on the file of the District Court, Salem for a declaration of title and for permanent injunction against defendants 1 to 3 and the same was withdrawn on 04.02.1987 with liberty to file a fresh suit on the same cause of action. The withdrawal was due to the reason that there were some formal defects. Even though the 6th defendant would state in the written statement that there was an earlier decision in O.S.No.629 of 1987, it is seen that the first plaintiff has filed I.A.No.3462 of 1987 in O.S.No.629 of 1987 praying for withdrawal of the suit to file a fresh suit on the same cause of action under Order 23 Rule 1 of Code of Civil Procedure, and the same after giving notice to the other side stood allowed on 04.12.1987 as it is seen under Ex.A.7. It is also not the case of the 6th defendant that there was any decision in the suit on merit. In view of the above said facts, I do not think that the present suit is hit by the principles of res judicata.

12. The next point to be considered is about the eligibility of the plaintiffs to have the decree for partition and the validity or otherwise of the judgement of the Trial Court. A close reading of the judgement of the Trial Court shows that in fact the Trial Court has not only considered

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every one of the documents filed and also evidence of the parties and has come to a conclusion that there was an earlier partition among the first plaintiff and the defendants 1 to 5 and that was the decision arrived at based on the construction of the terms of various documents produced before the Court below. That apart, the Trial Court has also considered the evidence of P.W.1 who himself has admitted that the sale to the 6th defendant was with a specific portion. A reference to the written statement filed by the 6th defendant, shows that even though it is true that there is no specific pleading that there was a oral partition among the first plaintiff and defendants 1 to 5, it is the clear case of the 6th defendant that the specific properties have been allotted to the plaintiffs by Theerappa Udayar in respect of the one third share with boundaries. Likewise, it is the specific case of the 6th defendant in the written statement that in respect of the other one third share which was sold to Vedathaal, in the deed of reconveyance under which Vedathaal along with the father of the first defendant Theerappa Udayar have sold to the first defendant under Ex.A.3 sale deed dated 01.10.1964 and the subsequent sale deed given by the first defendant in favour of the 6th defendant under Ex.A.5 dated 31.08.1987, specific boundaries have been given and therefore, it is the case of the 6th defendant that the properties have been specifically allotted to the parties and there was no question of partition. Based on the said pleadings, if we refer to the documents, as correctly found by the Court below it can be safely presumed that there has been a prior partition.

13. At the out set it should be remembered that it is an admitted case that originally the entire extent of 3.30 acres of punja lands were purchased by Theerappa Udayar as his absolute property under Ex.A.1 sale deed dated 04.12.1945. Therefore, there is no dispute that the property absolutely belonged to Theerappa Udayar and it is nobody's case that the purchase under Ex.A.1 was from ancestral nucleus. The said Theerappa Udayar along with one of his sons namely, the first defendant executes a sale deed in favour of Vedathaal in respect of the one third share on 10.10.1957 marked as Ex.A.2. The preamble of the said Ex.A.2 while mentioning about the said Theerappa Udayar and the first defendant as vendors in the subsequent recital shows clearly that Theerappa Udayar got the property by way of sale while the first defendant got it by way of partition. In the said Ex.A.2 Theerappa Udayar is stated as a first party and the first defendant is stated as a second party among the vendors. The relevant portion of Ex.A.2 as found by the Trial Court which states

> "இதன் அடியில் கண்ட சொத்துக்கள் எங்களில் 1 இலக்கமிட்டவருக்கு கிரயம் மூலமாயும் தீரப்ப உடையார், 2 இலக்கமிட்டவருக்கு (first defendant-Muthusamy) பாகப்பிரிவினைப்படி பாத்திய சொத்து இந்த சொத்துக்களின் பேரில் மூன்றில் ஒரு பங்கு பாக நிலத்தில் வேறு யாருக்கும் எவ்வித வில்லங்கங்களும் செய்யவில்லை என்று உறுதியாய் சொல்லுகிறோம்."

14. A further recital in the said Ex.A.2 shows that even in respect of the coconut trees there has been a division with the first defendant. In addition to the contents of Ex.A.2 which was executed during the time

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of the father Theerappa Udayar which gives more credit to the said document, the first plaintiff as P.W.1 himself admits that pursuant to Ex.A.2 sale deed the purchaser under the said document Vedathaal was given possession. In fact the first plaintiff further states that till the first defendant got back the property from Vedathaal in the following words:

"என் ஐயா வழக்கு மொத்த சொத்திலும் 1.3 பாகத்தை அதாவது ஒரு ஏக்கர் 10 சென்டை வேடாத்தாலுக்கு விற்றவுடன் அந்த சொத்தை அவருக்கு சுவாதீனம் விட்டார் என்றால் சரிதான்."

15. He would further admit that the portions sold to Vedathaal was the portion given to the share of his brother the first defendant

"வேடாத்தாலுக்கு என் ஐயாவால் விற்க்கப்பட்ட பாகம் என் தம்பிக்கு என் ஐயா கொடுத்த பாகமாகும்."

16. He would also further admit that the reason for his not joining under Ex.A.2 along with Theerappa Udayar and the first defendant was that the said portion was not allotted to him. Further in respect of the other one third portion which was settled by Theerappa Udayar in favour of the plaintiffs under Ex.A.4 settlement deed dated 03.04.1961, while in the plaint the plaintiffs have admitted that Theerappa Udayar has settled one third undivided share in the suit property in favour of the plaintiffs on 03.04.1961 under a registered settlement deed, the first plaintiff in his evidence as P.W.1 has specifically admitted that the said settlement deed Ex.A.4 contains specific boundaries and pursuant to the settlement deed, the plaintiffs have been put in possession by Theerappa Udayar in the following words:

"என் ஐயா ஒரு ஏக்கர் பத்து 10 சென்டை எனக்கும் என் மனைவி பேருக்கும் செட்டில்மென்டு எழுதிவிட்டார், அதை அனுசரித்து எங்களிடம் சுவாதீனம் விட்டுவிட்டார். அவ்விதம் செட்டில்மெட்டு வாயிலாக எங்களுக்கு கிடைத்தது என் ஐயாவால் எங்களுக்கு சுவாதீனம் விடப்பட்ட சொத்தை அன்றுமுதல் இன்று வரை நான் சுவாதீனத்தில் இருக்கிறேன்"

17. Likewise, in respect of the remaining one-third share held by Theerappa Udayar before his death, it is admitted by P.W.1 that after the death of the father his sisters, namely, defendants 2 to 5 have executed a power of attorney in favour of the first defendant in respect of their 72 cents of lands stating that the said power also contains the specific extent of the said 72 cents with boundaries

"என்சகோதரிகளுக்கு பாத்தியப்பட்டதாக சொல்லும் அந்த 72 சென்டை பொறுத்து 1ஆம் பிரதிவாதிக்கு பவர் பத்திரம் எழுதிக்கொடுத்து உள்ளார்கள். அந்த பவர் பத்திரத்திற்கு நகல் எடுத்து நான் பார்த்துள்ளேன். முத்துசாமி ஆராயம்மாளுக்கு எழுதிக்கொடுத்த பத்திரத்தில் அந்த 72 சென்டுக்கும் நான்கு புற அத்துக்களும் சொல்லப்பட்டுள்ளன என்றால் சரிதான்."

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18. Not only on the basis of the contents of Ex.A.2 and also specific admission of the first plaintiff as P.W.1 as a witness shows abundantly as found by the Court below that the properties have already been divided and enjoyed separately by parties. Further, the documents, namely, Ex.A.5, B.2 and B.3 all contain the schedules with specific boundaries. In such circumstances, as found by the court below, it is clear that there has been an earlier partition and therefore, the question of further partition under the suit does not arise. As to whether the earlier partition was equal, is not under dispute. There is one other circumstance as found by the Court below that after the sale, the 6th defendant has been enjoying specific properties by obtaining patta in her name as it is seen under Ex.B.4 especially relating to the remaining one-third share held by the father Theerappa Udayar, namely, to the extent of 1.10 acres to the total extent of 1.65 acres which includes 1.10 which was purchased by the first defendant from Vedathaal along with Theerappa Udayar and the remaining 36 and 19 cents which forms part of the share of the daughters, namely, defendants 2 to 5 which was purchased by the 6th defendant under Ex.B.3 dated 07.09.1987. While the said 1.10 acres sold by the first defendant was purchased under Ex.B.2 dated 31.08.1987 which also contains specific boundaries.

19. In view of the above said facts and circumstances of the case, and on a close reading of the judgement of the court below, it is clear that there is absolutely no illegality or perversity in the judgement of the court below, which deserves any interference by this Court. In view of the same, the judgement and decree of the Trial Court is confirmed and the first appeal stands dismissed with cost.

nbj

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Principal Subordinate Judge, Salem.

2. The Section Officer, V.R. Section,High Court, Madras.

+1 cc to Mr.P.Jagadeesan, Advocate Sr.No.32002.

BV(CO)
dcp/11.7.07

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